Filed 2/6/03 Rodriguez v. Prommer CA2/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SUSAN RODRIGUEZ et al., Plaintiffs and Appellants, v. KAREN PROMMER et al., Defendants and Respondents.	B154808 Super. Ct. No. BC251680

Appeal from an order of the Superior Court of Los Angeles County. Marilyn L. Hoffman, Judge. Order reversed and remanded with directions.

Irving Meyer for Plaintiffs and Appellants.

Rushfeldt, Shelley & Drake, Kathryn S. M. Mosely, Erica Levitt; Ballard, Rosenberg, Golper & Savitt, Christine T. Hoeffner and Dawn Cushman for Defendants and Respondents.

Plaintiff Susan Rodriguez and plaintiff Moses Mirano, a minor suing by and through his guardian ad litem, Susan Rodriguez ("Susan," "Moses," and together, "plaintiffs"), appeal from an order of dismissal entered after the trial court sustained, without leave to amend, the demurrer of defendants Karen Prommer and White Memorial Medical Center ("Prommer," "the hospital," and together, "defendants"). This suit alleges that Prommer, an employee of the hospital, asserted to plaintiffs' attorney that Susan never received any treatment at the hospital, and because of this assertion, Susan dismissed a suit against the hospital for medical malpractice that she had filed on behalf of herself. Upon learning that Prommer's representation was not true, Susan filed the instant suit on her own behalf for negligent misrepresentation, fraud, and negligent infliction of emotional distress, and on behalf of her son Moses, whom she alleges was negatively impacted by the hospital's medical malpractice that formed the basis of her prior suit.

The trial court, in sustaining defendants' demurrer without leave to amend, stated that Susan's causes of action for deceit fail as a matter of law because it was not reasonable for plaintiff's attorney to rely on Prommer's alleged representation that Susan was not treated at the hospital, and Susan's cause of action for negligence is barred by the statute of limitations and the doctrine of retraxit. As for Moses' cause of action for negligence, the court said it is not viable because he was not a patient of the hospital and therefore the hospital owed him no duty of care.

We find the trial court was correct in determining there can be no recovery on the deceit causes of action since reliance on Prommer's representation was not reasonable.

Moreover, Susan's count for negligent infliction of emotional distress fails on at least one ground—it was not timely brought. As for Moses' cause of action, he should be permitted to amend his complaint, if he can, to allege a cause of action as a direct victim of the hospital's alleged negligence.

Plaintiffs also challenge the trial court's order awarding Code of Civil Procedure section 128.7 attorney's fees against their attorney for filing an unmeritorious complaint.[1] Because we find that Moses' part of the complaint has merit but the trial court properly found the remainder of the complaint sanctionable, on remand of this case the trial court must reexamine the matter of sanctions.

BACKGROUND OF THE CASE [2]

1. *The Instant Suit*

a. *The Complaint and the Demurrer*

The instant suit was filed on June 4, 2001, when, according to the complaint, plaintiff Moses was three and one-half years old. The complaint alleges that Susan had previously sued the hospital for medical malpractice, but had dismissed that suit because of a representation made by the hospital's employee, defendant Prommer. The representation by Prommer was that Susan had not received any treatment at the hospital.

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[1] Unless otherwise indicated, all references herein to statutes are to the Code of Civil Procedure.

[2] Plaintiffs' briefs severely violate California Rules of Court, rule 14 (a) (1) and (2), which require that (1) statements of fact in an appellate brief be supported by a reference to the record, and (2) opening briefs "provide a summary of the significant facts limited to matters in the record." Needless to say, we do not consider matters asserted in a brief if they are not supported by a reference to the record.

In fact, however, Susan did receive laboratory work at the hospital, and Prommer knew or should have known that Susan received such treatment. Prommer made the false representation so that the hospital could avoid being exposed to damages in the prior action. Susan's dismissal of the hospital from the prior suit caused Susan to be unable to pursue, in that prior action, her claim against the hospital for medical malpractice.

Susan's claim of malpractice stemmed from the alleged fact that she was misdiagnosed as being HIV positive because defendants mislabeled, or contaminated, or in some other way, after drawing her blood, sent the wrong blood to the testing laboratory. In fact, she is not HIV positive. However, because of this negligent laboratory work, Susan and her son, plaintiff Moses, feared that Moses, might also be HIV positive, and so he had to undergo testing to determine his HIV status.

Plaintiffs' complaint contains counts for deceit (negligent misrepresentation and fraud), based on Prommer's representation that Susan was not treated at the hospital, as well as counts for negligence based on (1) Moses having to undergo testing because of the misdiagnosis of Susan's HIV status and his fear that he might be HIV positive (Moses' cause of action), and (2) Susan's emotional distress at the minor's possibly being HIV positive and his having to undergo testing (Susan's cause of action).

Defendants generally and specially demurred to the complaint. The general demurrer was sustained as to all counts and to both plaintiffs, without leave to amend. As indicated above, the court ruled that no count for deceit could be proven because as a matter of law, plaintiff could not show that her attorney's reliance on Prommer's representation was reasonable given that Prommer was an employee of the hospital and

no independent inquiry was made by plaintiff's attorney respecting whether plaintiff was treated at the hospital. The court further ruled that Moses' cause of action for negligence was not viable because he was not a patient of the hospital and therefore the hospital had no duty of care to him, and that Susan's count for negligence was barred by the statute of limitations and the doctrine of retraxit.

b. *Defendants' Motion for Sanctions*

Besides filing a demurrer, defendants also moved for sanctions against plaintiffs' attorney, Irving Meyer (but not against plaintiffs themselves). Defendants' motion was brought under section 128.7 which states, among other things, that by filing a complaint, an attorney "is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," (1) the complaint was not "presented primarily for an improper purpose, such as to harass," (2) the plaintiff's claims "are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law," and (3) the plaintiff's "allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."

Section 128.7 provides that the trial court may impose an appropriate sanction on the attorney if those terms are violated. Under section 128.7, the motion for sanctions is served but is not filed unless within 30 days after service, the challenged complaint "is not withdrawn or appropriately corrected."

According to defendants' appellate brief, no opposition was filed to the motion for sanctions. The trial court found that given the dismissal in the prior suit, there is no merit to the instant action, and plaintiff's attorney should have realized that. The court ordered plaintiffs' attorney to pay defendants' attorney $1,560 in attorney's fees and $451 in costs.

An order of dismissal was signed and filed on September 14, 2001, and on September 26, 2001, defendants served notice of the dismissal. Thereafter, plaintiffs filed this timely appeal.

2 . *Specifics of the Prior Action*

With respect to the prior action, the record shows it was filed on June 2, 2000. In that suit, Susan named the hospital and MRL Reference Laboratory as defendants. Moses was not a plaintiff. The complaint alleged Susan was informed on June 23, 1999 that she was not HIV positive and thus she became aware she had been caused to take unnecessary medication and suffer physical injuries, caused to suffer emotional distress "with the thoughts and feelings of having HIV," and caused out of pocket losses.

The hospital filed an answer in the prior suit. Later, Susan dismissed the hospital from that case, with prejudice, on August 11, 2000. Then, on February 14, 2001, she filed a section 473 motion to vacate her request for dismissal. In that motion, she asserted the dismissal should be vacated because it was caused by her attorney's having been advised by the hospital's risk manager that the hospital was only a referral center and it did not examine or treat Susan. The motion stated that later the attorney discovered, by means of special interrogatories sent to another defendant, that plaintiff

had actually been sent to the hospital for the HIV test. Plaintiff asserted that her attorney's mistake and inadvertence caused her to dismiss the hospital from her suit.

Attorney Irving Meyer submitted his declaration in support of Susan's motion to vacate. He stated that on June 6, 2000, he received a telephone call from a person who identified herself as "Karen," and who represented to him that she is the hospital's risk manager, and that the hospital did not examine or treat Susan, but rather, it simply referred her to White Memorial Medical Group and a Dr. Abdou. Karen demanded that plaintiff dismiss the suit against the hospital. ("Karen" is defendant Karen Prommer in the instant case.) After speaking with Karen, attorney Meyer served the summons and complaint on White Memorial Medical Group and Dr. Abdou as Does 1 and 2, and he filed a request for dismissal of the hospital with prejudice. Thereafter he served Dr. Abdou with special interrogatories, asking to whom the doctor had sent Susan to have her blood drawn for HIV testing, and who owns or controls "the entity or place you sent plaintiff to have her blood drawn." Dr. Abdou answered that the hospital owned or controlled it.

Meyer stated in his supporting declaration that if he had not been "assured so strongly" by Karen that the hospital did not treat or examine Susan but had only referred her to White Memorial Medical Group, he would not have dismissed the hospital from the suit. On March 13, 2001, the motion to vacate the dismissal was denied on the ground it was not timely since the motion to dismiss was filed on August 11, 2000 and the motion to vacate the dismissal was filed on February 14, 2001, which is more than six months from the date of the dismissal. Moreover, said the court, Susan had failed to

present sufficient evidence demonstrating mistake, inadvertence, surprise or excusable neglect within the meaning of section 473.

Later in that same month, March 2001, Susan filed a second motion to vacate, this time relying on the court's inherent equity power to grant relief from a dismissal caused by extrinsic fraud or mistake. She asserted that Prommer's representation that the hospital only referred Susan and did not examine or treat her constitutes such extrinsic fraud. On April 24, 2001, that second motion was also denied, the court finding that Susan had failed to meet the requirements of section 1008's provisions for renewal motions.

Susan then sought appellate relief from the denial of her motions to vacate. The court of appeal (Second Appellate District, Division Seven), affirmed the denial of the first motion to vacate, finding such motion was not timely, and further finding that dismissing the hospital without first conducting discovery to determine liability cannot be deemed excusable, and the "attorney fault" provisions in section 473 are not applicable to a voluntary dismissal. As for the second motion to vacate, the reviewing court said such motion did not meet the requirements of section 1008, and there was no evidence of extrinsic fraud or mistake, as those terms have been construed for motions to vacate brought under a court's inherent equity power. Division Seven's decision has become final.

CONTENTIONS ON APPEAL

On appeal, plaintiffs contend (1) their complaint in the instant suit alleges all of the elements of a cause of action for deceit, (2) Moses has a cause of action for

negligence because he was a "known intended victim of any misdiagnosis by [the hospital]," and (3) Susan has a cause of action for negligence because she witnessed the trauma of seeing Moses being examined for HIV and she suffered the "expectation of [his] having HIV."

DISCUSSION

1. *Standard of Review*

A demurrer tests the sufficiency of the allegations in a complaint as a matter of law. (*Pacifica Homeowners' Assn*. v. *Wesley Palms Retirement Community* (1986) 178 Cal.App.3d 1147, 1151.) We review the sufficiency of the challenged complaint de novo. (*Coopers & Lybrand v. Superior Court* (1989) 212 Cal.App.3d 524, 529.) We accept as true the properly pleaded allegations of fact in the complaint, but not the contentions, deductions or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We also accept as true facts which may be inferred from those expressly alleged. *Marshall* v. *Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) We consider matters which may be judicially noticed, and we "give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.) We do not concern ourselves with whether plaintiffs will be able to prove the facts that they allege in their complaints. (*Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1521.) The judgment or order of dismissal must be affirmed if any of the grounds for demurrer raised by the defendant is well taken and disposes of the complaint. (*Aubry v. Tri-City Hospital Dist*. (1992) 2 Cal.4th 962, 967.) It is error to sustain a general demurrer if the complaint states a cause of action under any

possible legal theory. (*Ibid*.) It is an abuse of the trial court's discretion to sustain a demurrer without leave to amend if there is a reasonable possibility the plaintiff can amend the complaint to allege any cause of action. (*Ibid*.) To prove abuse of discretion, the plaintiff must demonstrate how the complaint can be amended. Such a showing can first be made to the reviewing court. (*Careau & Co*. *v*. *Security Pacific Business Credit, Inc*. (1990) 222 Cal.App.3d 1371, 1386.)

2. *The Causes of Action for Deceit*

In a cause of action for deceit, whether the charge be fraud or negligent misrepresentation, the plaintiff must allege and prove that she justifiably relied on the deceitful representation. (*Home Budget Loans, Inc*. *v*. *Jacoby & Meyers Law Offices* (1989) 207 Cal.App.3d 1277, 1285.) Here, the trial court properly rejected the causes of action for fraud and negligent misrepresentation because as a matter of law, Susan cannot possibly prove the element of justifiable reliance on Prommer's alleged representation that she was not treated by the hospital. Susan's attorney accepted Prommer's representation at face value, conducting no independent research, no discovery, to either confirm or reject that representation prior to dismissing the hospital from the initial suit. As a matter of law he was not justified in relying on the assertion of someone who is an employee of the adversary hospital when that person told him that the hospital can have no liability because it did not treat Susan. (Cf. *Wilhelm v*. *Pray, Price, Williams &*

Russell (1986) 186 Cal.App.3d 1324, 1332.)[3] In this case, justifiable reliance by Susan's representative, Mr. Meyer, is not a question for the trier of fact.

3. *Susan's Cause of Action for Negligence*

Susan asserts a cause of action against the hospital for negligence based on her emotional distress from (1) knowing Moses might be HIV positive when she believed that she was HIV positive and (2) Moses having to undergo HIV testing.

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[3] Defendants also argue that Prommer's alleged misrepresentation is absolutely protected by the litigation privilege in Civil Code section 47, subdivision (b), and they cite *Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 Cal.App.4th 17, 20, where the court held that a defendant insurance company's alleged misrepresentation about available policy limits was absolutely privileged (and further held the alleged misrepresentation was intrinsic and not extrinsic fraud which, therefore, would not support a claim for equitable relief). The litigation privilege applies to causes of action for fraud and negligent misrepresentation. (*Id.* at p. 23.) The privilege " 'encourag[es] attorneys to zealously protect their clients' interests' [and] 'places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence, thereby enhancing the finality of judgments and avoiding an unending roundelay of litigation, an evil far worse than an occasional unfair result. [Citations.]' " (*Ibid.*)

In *Home Ins. Co.*, the court stated: " 'The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have [sic] some connection or logical relation to the action. [Citations.]' [Citation.]" (*Home Ins. Co.*, *v. Zurich Ins. Co. supra*, 96 Cal.App.4th at pp. 23-24.) The court noted that statements by counsel and defending insurance carriers can be included in the privilege. (*Id.* at p. 24.)

Here, the alleged deceitful statement was made by the *employee* of a defendant in the prior litigation, and while defendants rely on the litigation privilege, and rely on *Home Ins. Co.*, they do not bother to analyze the elements of the privilege to show that they apply to a statement made by such an employee. Given that defendants have not fully developed the privilege issue, and given our ability to dispose of the deceit causes of action on the ground that reliance on the alleged misrepresentation was unreasonable as a matter of law under the circumstances of the case, we need not decide whether defendants have properly invoked the litigation privilege.

Assuming arguendo that Susan's cause of action would otherwise be viable, an issue we do not decide here, it is barred by the statute of limitations in section 340.5 which provides that "[i]n an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first." (§ 340.5.) In section 340.5, " '[p]rofessional negligence' means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, . . ." (§ 340.5.)

Here, Susan's alleged injury is her emotional distress concerning Moses. That injury is alleged to be proximately caused by the hospital's alleged professional negligence in its testing to determine whether she is HIV positive. In both of her suits, Susan alleged that on June 23, 1999, she discovered that she is not HIV positive. Therefore, on that day, she necessarily discovered that her emotional distress over Moses was allegedly without just cause, and thus, on that day, the one-year statute of limitations on her cause of action for such emotional distress began to run. Since the instant action was not filed until June 4, 2001, nearly two years later, her cause of action for emotional distress is necessarily time barred.

4. *Moses' Cause of Action for Negligence*

Moses asserts a cause of action against the hospital for negligence based on his having to undergo HIV testing and his fear that he is HIV positive. The act of

professional negligence by the hospital alleged to be the proximate cause of his injury is the hospital's alleged negligence in testing his mother, Susan, and in misreporting the results of such testing to her.

Moses' cause of action is not limited by the one-year limitations period that governs Susan's cause of action. Section 340.5 provides that "[a]ctions by a minor shall be commenced within three years from the date of the alleged wrongful act except that actions by a minor under the full age of six years shall be commenced within three years or prior to his eighth birthday whichever provides a longer period. Here, the complaint alleges Moses was three and one-half years old when the instant suit was filed.

While the trial court found Moses cannot state a cause of action because the hospital had no duty of care to him, we do not agree. It may be that Moses can be considered a "direct victim" in the same way the husband in *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916 was considered a direct victim of the defendant hospital in that case when it negligently diagnosed his wife as having syphilis although she in fact did not have the disease, and directed her to advise her husband of the diagnosis so that he could receive testing and any necessary treatment. In *Molien*, the court reversed a dismissal of the husband's case that was entered after the trial court sustained the hospital's general demurrer without leave to amend. The court stated the risk of harm to the husband, who sued for damages for emotional distress, loss of consortium and medical expenses, was reasonably foreseeable. (*Id*. at p. 923; accord, *Huggins* v. *Longs Drug Stores California, Inc*. (1993) 6 Cal.4th 124, 130.) In the instant case, it may be that in conveying Susan's incorrect HIV test results to her, the hospital advised her to

have her children tested for the virus. If that is true, then Moses should be permitted to amend the complaint to allege a cause of action as a direct victim of the hospital. Regarding his damages, the complaint alleges Moses endured the emotional distress and physical pain of HIV testing, and the emotional distress of fearing he too had the virus. Regarding the second claim of emotional distress , we hold as a matter of law that a child approximately 18 months of age, as Moses apparently was when he was tested, does not have the ability to comprehend the implications of being HIV positive. However, technically Moses can claim damages for the "pain and suffering" associated with the testing procedure itself.

Although Moses was not a plaintiff in Susan's first suit, the hospital asserts the issue of the hospital's negligence in testing Susan for the HIV virus has already been decided in favor of the hospital, by means of Susan's dismissal with prejudice in her first lawsuit, and therefore Moses can have no cause of action against the hospital that relies on the issue of the hospital's negligence because he is in privity with Susan with respect to that issue. Hospital cites *Clemmer v. Hartford Insurance Co*. (1978) 22 Cal.3d 865 ("*Clemmer*"). The basis of the hospital's contention is the doctrine of collateral estoppel, that is, issue preclusion.

In *Clemmer*, the court observed that "a party will be collaterally estopped from relitigating an issue only if (1) the issue decided in a prior adjudication is identical with that presented in the action in question; and (2) there was a final judgment on the merits; and (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication. [Citation.] This requirement of identity of parties or privity is a

requirement of due process of law. [Citations.]" (*Clemmer*, *supra*, 22 Cal.3d at p. 874, italics omitted.) The Clemmer court went on to say that "[i]n the context of collateral estoppel, due process requires that the party to be estopped must have had an identity or community of interest with, and adequate representation by, the losing party in the first action as well as that the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication. [Citation.] Thus, in deciding whether to apply collateral estoppel, the court must balance the rights of the party to be estopped against the need for applying collateral estoppel in the particular case, in order to promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments which undermine the integrity of the judicial system, or to protect against vexatious litigation. [Citations.]" (*Id*. at p. 875.)

Given the manner in which Susan's first suit was concluded, we cannot say that application of collateral estoppel here would be proper. It is true that a plaintiff's dismissal with prejudice operates as a bar to a later lawsuit on the same claim because the dismissal is deemed a judgment on the merits of that claim. Dismissal with prejudice is the modern term for the common law doctrine of retraxit.[4] (*Rice v. Crow* (2000) 81

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[4] "At common law, a 'retraxit' was 'an open and voluntary renunciation of the suit in open court.' [Citations.] The primary features of a common law retraxit were that it was made by the plaintiff in person and in open court. [Citation.]" (*Rice*, *supra*, 81 Cal.App.4th at p. 733.) Because the plaintiff must have knowledge and give consent to the dismissal of the action, a plaintiff seeking to vacate a dismissal that was achieved without such knowledge and consent is not subject to the 6-month time limit of section 473 and not subject to the rules respecting extrinsic fraud and mistake, but rather, the dismissal "remain[s] voidable for an indeterminate period, and [the plaintiff can] vacate the unauthorized dismissal within a reasonable time after learning of it." (*Whittier Union*

Cal.App.4th 725, 733-734 ("*Rice*").) Because this bar exists, the second element of collateral estoppel is met in the instant case.

However, we do not find that the first element of collateral estoppel is present. In *Clemmer*, the court spoke of "reexamin[ing]" issues in a subsequent suit that were "necessarily decided" in a previous suit, and of "fully litigating" the subject issues. (*Clemmer*, *supra*, 22 Cal.3d at p. 874, 877; accord *Rice*, *supra*, 81 Cal.App.4th at p. 735.) In *Rice*, the court specifically stated that for collateral estoppel to apply, the issue(s) sought to be precluded "must have been *actually litigated*. [Citation.]" (*Rice*, *supra*, at p. 736.) It noted that judgments entered, for example, by default or by consent when the consenting parties do not manifest an intent to give the judgment a preclusive effect, do not involve "actually litigating any issues." (*Id*. at pp. 736-737.) Here, Susan simply dismissed her first suit upon the alleged representation by defendant Prommer that Susan received no treatment at the hospital. This is not sufficient to support a finding that the first element of issue preclusion is applicable here. Nor could we possibly find that Moses had "adequate representation" by Susan in her first action. (*Clemmer*, *supra*, 22 Cal.3d at p. 875.) Thus, the third element of collateral estoppel—privity—is also not met here. Therefore, Moses is not precluded from raising the issues raised in that initial action, such as the hospital's negligence.

High Sch. Dist. *v*. *Superior Court* (1977) 66 Cal.App.3d 504, 507-508.) Vacation requires "strong and convincing proof." (*Id*. at p. 509.)

5. *The Issue of Sanctions*

Defendants contend this court has no jurisdiction to review the sanctions award made against plaintiffs' attorney, Mr. Meyer, because attorney Meyer did not file his own notice of appeal. Although the better practice is for the sanctioned attorney to file his own notice of appeal, we will liberally construe plaintiffs' notice of appeal to include Meyer as an appellant, defendants having shown no prejudice from Meyer's mistake. (*Kane v. Hurley* (1994) 30 Cal.App.4th 859, 861, fn. 4.)

Section 128.7 states that by filing the complaint, attorney Meyer certified "that to the best of [his] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," that the claims of deceit "are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law," and that the factual allegations respecting deceit have evidentiary support or "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." This "actual belief standard requires more than a hunch, a speculative belief, or wishful thinking; it requires a well-founded belief. We measure the truthfinding inquiry's reasonableness under an objective standard, . . ." (*Bockrath v. Aldrich Chemical Co*. (1999) 21 Cal.4th 71, 82.)

Having found that as a matter of law there could be no recovery on the deceit causes of action since reliance on Prommer's representation was not reasonable, we further find that sanctions are warranted for alleging those causes of action in the complaint. Our conclusion is supported by attorney Meyer's own admission, at the

hearing on Susan's second motion to vacate in her original suit, that it was "stupid of [him] to fall for [Prommer's representation that the hospital did not treat Susan]." The objective standard also requires us to conclude that attorney Meyer should have realized that Susan's cause of action for negligent infliction of emotional distress was barred by the one-year statute of limitations.

However, because we find that Moses' cause of action may have legal viability, there can be no imposition of sanctions that includes sanctioning Meyer for having included Moses' claims in the complaint. The minute order dated September 5, 2001 shows the trial court's imposition of sanctions included such improper sanctions. Therefore, upon remand of this case, the trial court must reexamine the issue of sanctions and issue an appropriate order thereon.

DISPOSITION

The order of dismissal is reversed as to plaintiff Moses Mirano, and the cause is remanded for further proceedings consistent with the views expressed herein, including appropriate further proceedings on his suit, and reexamination of the section 128.7 sanctions awarded against his attorney. The parties shall bear their own costs on appeal.

Counsel for plaintiff Susan Rodriguez is ordered to serve Ms. Rodriguez with a copy of this opinion. Counsel is further ordered to file, with this court, proof of such service, not later than 15 days of the date this opinion is filed.

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CROSKEY, J.

We concur:

KLEIN, P.J.

KITCHING, J.